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No. 01-1585

In the Supreme Court of the United States

MAX MOUSSAZADEH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a guilty plea induced by counsel's incorrect advice regarding parole eligibility is involuntary where parole eligibility was not part of the plea bargain?

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MAX MOUSSAZADEH,
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v.

STATE OF TEXAS,
Respondent.

BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to Max Moussazadeh's petition for writ of certiorari. In his petition, Moussazadeh asks the Court to review the decision of the Texas Court of Criminal Appeals that affirmed his conviction for murder. *Ex parte Moussazadeh*, 64 S.W.3d 404 (Tex. Crim. App. 2001). Specifically, Moussazadeh attacks the lower court's holding that "before a habeas applicant may prevail on a claim that erroneous advice of counsel concerning parole eligibility rendered his guilty plea involuntary, he must prove that parole eligibility was an affirmative part or essential element of the plea bargain." *Id.*, at 410.

The Court should deny Moussazadeh's petition because the Texas Court of Criminal Appeals's decision does not conflict with relevant decisions of this Court and the question presented does not incorrectly decide an important federal question that should be settled by this Court. *See* SUP. CT. R. 10(b), (c).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Moussazadeh was indicted for the offense of capital murder. *Ex parte Moussazadeh*, Application No. 29,652-02, at 133.[1] Moussazadeh entered into a plea bargain and pleaded guilty to the lesser included offense of murder. *Id.*, at 42. Following a separate punishment hearing, the court assessed punishment of seventy-five years imprisonment to be served in the Texas Department of Criminal Justice–Institutional Division. *Id.*, at 135.

The Fourteenth Court of Appeals affirmed Moussazadeh's conviction and the Texas Court of Criminal Appeals refused his petition for discretionary review. *Moussazadeh v. State*, 962 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Thereafter, Moussazadeh filed a state application for writ of habeas corpus that was denied by the Texas Court of Criminal Appeals. *Ex parte Moussazadeh*, 64 S.W.3d 404 (Tex. Crim. App. 2001).

B. Statement of Facts

Moussazadeh's juvenile-delinquent career culminated in the murder of David Orlando. *Ex parte Moussazadeh*, Application No. 29,652-02, at 71. Moussazadeh relayed the following sequence of events during his testimony at a co-defendant's trial. Moussazadeh was a 16-year old sophomore at Austin Academy and went to school with each of the other participants. *Id.*, at 52-3. While hanging out on the evening of September 12, 1993, Moussazadeh and three others planned to commit an aggravated robbery of the Dairy Barn restaurant. *Id.*, at 54. The plan was that the driver and one other boy would wait in the car while Moussazadeh and Collier

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1. The record of the trial proceedings is incorporated into the state habeas record. Thus, references to the record will be cited as: *Ex parte Moussazadeh*, Application No. 29,652-02, at p.#.

held Mr. Orlando, the owner, at gun point, robbed him, tied him up, and then ran away to the waiting car. *Id.*, at 67.

They put the plan in action that night and drove to the Dairy Barn. Moussazadeh and Collier hid in a field next to the restaurant and waited for it to close. *Id.*, at 56. When they saw the lights go out, Moussazadeh and Collier ran and hid behind a dumpster next to the Dairy Barn. *Id.* Mr. Orlando came out carrying a black duffle bag. *Id.* Collier confronted Mr. Orlando with a gun and demanded the money. *Id.*, at 57. Collier ordered Mr. Orlando to lay on the ground and took the money bag from him. *Id.* Collier and Moussazadeh then ordered Mr. Orlando to go into the field. *Id.* While Mr. Orlando pleaded for his life, Collier fired two shots at Mr. Orlando. *Id.*, at 59-60. Collier and Moussazadeh ran away with Mr. Orlando's bag containing $500 and left Mr. Orlando bleeding on the ground to die. *Id.*, at 62.

ARGUMENT

I. THE LOWER COURT'S DECISION IS NOT IN CONFLICT WITH ANY OTHER DECISION AND DOES NOT PRESENT AN IMPORTANT QUESTION THAT SHOULD BE DECIDED BY THE COURT.

Moussazadeh asks the Court to review "whether a guilty plea induced by counsel's incorrect advice regarding parole eligibility is involuntary where parole eligibility was not part of the plea bargain." Pet. at i. Applying Texas state law, the court of criminal appeals required that parole eligibility must be a term of the plea bargain before counsel's ineffective assistance can be held to invalidate a guilty plea. *Ex parte Moussazadeh*, 64 S.W.3d at 412. The Texas Court of Criminal Appeals's expressly stated:

> "This Court has repeatedly held that before a habeas applicant may prevail on a claim that erroneous advice of counsel concerning parole eligibility rendered his guilty plea involuntary, he must prove that parole eligibility was

> an affirmative or essential element of the plea bargain." *Ex parte Moussazadeh*, 64 S.W.3d, at 410 (citing *Ex parte Trahan*, 781 S.W.2d 291, 293 (Tex. Crim. App. 1989); *Ex parte Hairston*, 766 S.W.2d 790, 792 (Tex. Crim. App. 1989); *Ex parte Stephenson*, 722 S.W.2d 426, 428 (Tex. Crim. App. 1987); *Ex parte Pruitt*, 689 S.W.2d 905, 906 (Tex. Crim. App. 1985)).

Moussazadeh argues that the Texas Court of Criminal Appeals's holding "conflicts in principle with decisions of this Court governing the standards for determining the voluntariness of a guilty plea, and conflicts with decisions of federal circuit and state supreme courts on this precise issue." Pet. at 10, *see also* SUP. CT. R. 10(b), (c). Contrary to Moussazadeh's assertions, there is no circuit split because no other court has considered whether parole eligibility must be a term of the plea bargain before counsel's erroneous advice regarding parole will invalidate a guilty plea.

Moreover, Moussazadeh's attempt to fabricate a conflict in the circuits fails. None of the cases relied upon to support the alleged split even mention, much less apply, the legal standard adopted by the Texas Court of Criminal Appeals. *See Ex parte Moussazadeh*, 64 S.W.3d, at 410. Essentially, Moussazadeh's argument proves too much by showing that there is no circuit split on the holding reached by the Texas Court of Criminal Appeals.

Notwithstanding the question presented, Moussazadeh attempts to persuade the court to address the question left open in *Hill v. Lockhart*, 474 U.S. 52, 60 (1985)—whether defense counsel's erroneous advice regarding parole eligibility renders a guilty plea involuntary. Pet. at 7-8. This case, however, presents the question whether the Texas Court of Criminal Appeals erroneously held that parole eligibility must be an affirmative term of the plea bargain before counsel's incorrect advice regarding a parole law will invalidate a guilty plea—not whether ineffective assistance of counsel regarding parole eligibility will invalidate a guilty plea.

The Respondent has found no other state or federal court that has required that parole eligibility be a term of a plea bargain before invalidating a guilty plea based on counsel's erroneous advice regarding parole. Moreover, the Court has never held that a defense counsel's inaccurate advice regarding parole eligibility renders a guilty plea unknowing or involuntary. And there is no reason for the Court to create a new constitutional rule in this case.

In *Hill*, the Court stated: "We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." 474 U.S., at 60. It was unnecessary to reach the question in *Hill*, because "petitioner's allegations [were] insufficient to satisfy *Strickland v. Washington* requirement of "prejudice." *Hill*, 474 U.S., at 60.[2]

Several circuit courts have recognized that giving misinformation regarding parole eligibility can constitute ineffective assistance of counsel. *See Beavers v. Saffle*, 216 F.3d 918, 925 (CA10 2000); *Meyers v. Gillis*, 142 F.3d 664, 666 (CA3 1998); *Garmon v. Lockhart*, 938 F.2d 120, 121 (CA8 1991); *Holmes v. U.S.*, 876 F.2d 1545, 1552 (CA11 1989) *Cepulonis v. Ponte*, 699 F.2d 573, 577 (CA1 1983); *Strader v. Garrison*, 611 F.2d 61, 65 (CA4 1979). Yet, all the circuit courts that confronted the issue of whether counsel's ineffective assistance regarding parole eligibility can invalidate a guilty plea, have followed *Hill*,

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2. In *Hill*, the Court held that the two-prong test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to cases involving guilty pleas. *Hill*, 474 U.S., at 58. Under *Strickland*, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. 466 U.S., at 687. A claim of ineffective assistance of counsel may be disposed of for either reasonable performance of counsel or lack of prejudice; and if one is found dispositive, it is not necessary that a court address the other. *Id.*, at 697.

and applied *Strickland*'s two-part test when determining whether counsel's performance was constitutionally ineffective to render a guilty plea involuntary. *See Beavers*, 216 F.3d, at 925; *Meyers*, 142 F.3d, at 666; *James v. Cain*, 56 F.3d 662, 667 (CA5 1995); *Garmon*, 938 F.2d, at 121; *Shah v. U.S.*, 878 F.2d 1156, 1158 (CA9 1989); *Holmes*, 876 F.2d, at 1551 *Cepulonis*, 699 F.2d, at 577; *Strader*, 611 F.2d, at 63. Consequently, there is no conflict among the lower courts and *Hill*.

In this case, the Texas Court of Criminal Appeals applied Texas law and held that parole eligibility must be a part of the plea bargain before counsel's erroneous advice regarding parole eligibility will render a guilty plea involuntary. *Ex parte Moussazadeh*, 64 S.W.3d, at 412. There is no conflict between the Texas Court of Criminal Appeals's holding and the other courts. Even if the Court disagrees and determines that the Texas Court of Criminal Appeals's decision conflicts in principle with *Hill* and other federal and state decisions, this case is not an appropriate vehicle to review the issue because the Texas Court of Criminal Appeals's did not discuss—or apply—the *Hill* standard; it applied Texas law.

Moussazadeh's attempt to coax the Court into reviewing the issue—whether ineffective assistance of counsel regarding parole eligibility will invalidate a guilty plea—must fail because he has not shown the existence of a clear circuit split on the issue. To prove there is a conflict, Moussazadeh premises his argument on a negative inference, "no court has ever required that counsel's incorrect advice . . . be part of a plea bargain in order to have Fifth and Sixth Amendment significance," and argues that the lower court's holding "conflicts in principle" with prior precedent. Pet. at 9. The fact that the courts of appeals and other state and federal courts that have addressed the issue did not require that parole eligibility be part of a plea bargain belies Moussazadeh's contention there is a circuit split. Because the issue is not immediate and

compelling, the Court should postpone consideration of the question until it is squarely presented and there is disagreement among the lower courts.

Notwithstanding Moussazadeh's invitation, the Court should not review the pure question of whether defense counsel's erroneous advice regarding parole eligibility renders a guilty plea involuntary because that issue was not decided by the Texas Court of Criminal Appeals and thus, this case does not present a meaningful opportunity to decide that question. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The Court should not expend its resources to issue an advisory opinion, which has been "disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (citing *Muskrat v. U.S.*, 219 U.S. 346, 362 (1911) and *Hayburn's Case*, 2 Dall. 409 (1792)). Moussazadeh's claim does not warrant the exercise of this Court's certiorari jurisdiction.

II. MOUSSAZADEH'S GUILTY PLEA WAS KNOWING AND VOLUNTARY.

The Court recently reiterated that the plea bargaining process is an important component of our criminal justice system. *See United States v. Ruiz*, 122 S.Ct. 2450, 2457 (2002). And, in *Brady v. United States*, the Court stated:

> "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack *if the defendant did not correctly assess every relevant factor entering into his decision.* A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or *the likely penalties attached to alternative courses of action.*" 397 U.S. 742, 757 (1970) (emphasis added).

Thus, a guilty plea is not rendered involuntary simply because a defendant miscalculates the result of his plea. In particular, the Constitution does not require a State to furnish a criminal defendant with information about parole eligibility in order for the defendant's plea of guilty to be knowing. *Hill*, 474 U.S., at 56. To the contrary, such a requirement would be inconsistent with federal law governing plea procedures:

> "We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts." *Id.*, at 57.

All procedural requirements for a knowing and voluntary plea were satisfied in this case. In open court, the State advised that the terms of the plea bargain included: that the charged offense would be reduced from capital murder to murder, that Moussazadeh would testify truthfully, honestly and fully against co-defendant, Justin Dudik, that sentence would be imposed after Dudik's trial, and that Moussazadeh would plead without an agreed recommendation on punishment. *Id.*, at 33-35. Moussazadeh acknowledged these terms as the only terms of the plea bargain. *Id.*, at 44-5. Based on this plea bargain, Moussazadeh chose to voluntarily plead guilty. *Id.*, at 45.

In open court, Moussazadeh solemnly acknowledged that he understood nature of the offense charged and the consequences of his plea. Specifically, he averred: that he was charged with the murder of David Orlando, that he voluntarily waived his right to a jury trial and to confront and cross-examine witnesses, and that the range of punishment for the offense of murder is 5 to 99 years, or life with a possible maximum fine of $10,000. *See Ex parte*

Moussazadeh, Application No. 29,652-02, at 41-45; *see also* TEX. PEN. CODE §12.32 (Vernon 1994).

Notwithstanding these solemn declarations, Moussazadeh now argues that his plea was involuntary because he expected to serve at most, one-fourth of his sentence under a parole law that changed 11 days prior to his offense.[3] Moussazadeh's counsel had explained the old parole law to Moussazadeh and as the court of criminal appeals noted, "it is quite possible that no one in this proceeding knew that the parole law had changed dramatically just 11 days before this robbery-murder." *See Ex parte Moussazadeh*, 64 S.W.3d, at 409.

Regardless, the inapplicability of the old parole law is not material. The court of criminal appeals correctly held that parole eligibility after serving one-fourth of Moussazadeh's sentence was not part of the negotiated plea bargain and, thus, did not form the basis of any inducement for Moussazadeh's plea of guilty on which he can be said to have relied. *See Ex parte Moussazadeh*, 64 S.W.3d, at 413. Any argument that Moussazadeh relied upon and was induced to plead guilty based on his belief that the prior, more favorable, parole law would apply to his sentence is conclusively

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3. Moussazadeh committed this offense on September 12, 1993. *See Ex parte Moussazadeh*, Application No. 29,652, at 134. Parole eligibility is determined by the law in effect on the date the offense occurred. *See Ex parte Moussazadeh*, 64 S.W.3d, at 409. Until September 1, 1993, a person serving a life sentence for murder without a deadly-weapon finding was eligible for parole when flat time plus good time equalled one-quarter of the sentence, or 15 years, whichever was less. *See* TEX. CODE CRIM. PROC. art. 42.18 §8(b)(3) (Vernon 1993). For offenses committed after September 1, 1993, however, a person serving a sentence for murder—with or without a deadly-weapon finding—is eligible for parole when flat time equals one-half of the sentence imposed, or 30 years, whichever is less. *Id.*, art. 42.18 §8(b)(3) (Vernon 1994).

refuted by the state court record of the plea hearing. *See Ex parte Moussazadeh*, Application No. 29,652-02, at 30-51.

The record shows that neither the State nor the court made any promise to Moussazadeh regarding eligibility for parole. *See Ex parte Moussazadeh*, 64 S.W.3d, at 410. The most significant term of the plea bargain was a reduction in the offense charged from capital murder to murder. *Id.*, at 408. The plea hearing establishes that the State honored its promise and Moussazadeh pleaded guilty to the reduced charge of murder, which the trial court accepted. *See Ex parte Moussazadeh*, Application No. 29,652-02, at 42, 46. Because there was no agreed punishment recommendation, Moussazadeh's mere expectancy of an early parole date was nothing more than a hope.

Moussazadeh voluntarily signed a waiver of trial by jury and a stipulation of evidence and acknowledged his signature to the trial court. *Id.*, at 43. In open court, Moussazadeh declared that he had no questions regarding the plea papers, admitted his guilt, and entered his plea on the record. *Id.*, at 43-44. Parole eligibility was not a part of Moussazadeh's negotiated plea in this case. Thus, Moussazadeh should not be permitted to set aside his "solemn declarations made in open court" at this late date. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

The Court has affirmatively recognized that criminal convictions should be accorded finality and that the presumption of finality is strongest in collateral attacks. *See Blackledge*, 431 U.S., at 71. "The concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (quoting *Stone v. Powell*, 428 U.S. 465, 491 & n.31 (1976), and *Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977)). This principle should be respected in this case, especially because the state record establishes that Moussazadeh's guilty plea was knowingly and voluntarily entered.

The mere expectation of a favorable discretionary decision of parole release should not rise to the level of a constitutional error that invalidates a judgment of guilt for the offense of murder. To hold otherwise, establishes a basis for collateral attacks on every plea bargain any time that a criminal defendant does not become eligible for parole release on the date estimated by defense counsel.

Because Moussazadeh was fully aware that there was no recommended sentence and that the trial court had discretion to impose the maximum sentence, counsel's advice regarding parole eligibility, even if erroneous concerning a statutory provision, amounts to nothing more than an estimate or prediction as to the sentence Moussazadeh might receive when he pleaded guilty. Such an erroneous prediction by defense counsel cannot render Moussazadeh's plea involuntary since it is clear that Moussazadeh was not falsely induced to plead guilty. *See Little v. Allsbrook*, 731 F.2d 238, 241 (CA4 1984) ("An attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty plea and is not reason to invalidate a plea.").

III. THE COURT OF CRIMINAL APPEALS PROPERLY HELD THAT PAROLE ATTAINMENT IS TOO SPECULATIVE TO INVALIDATE A GUILTY PLEA.

The Texas Court of Criminal Appeals concluded that even if defense counsel misadvised Moussazadeh as to parole eligibility, that fact does not render his guilty plea involuntary because "both parole eligibility and parole attainment are highly speculative future facts." *See Ex parte Moussazadeh*, 64 S.W.3d, at 413. This conclusion reflects a sound rule of law because parole eligibility is not a direct consequence of a guilty plea. *See Hill*, 474 U.S., at 56; *see also Holmes*, 876 F.2d, at 1549. Thus, legal advice regarding a collateral consequence should not render a plea involuntary where the state court record presumptively establishes that the advice was not part of the plea bargain and did not induce the plea. *See Ex parte Moussazadeh*, No. 29,652-02, at 33.

The applicable statutory provisions regarding Texas parole law provide that an inmate's eligibility for parole is within the discretion of a Parole Board. *See Ex parte Moussazadeh*, 64 S.W.3d, at 413; *see also* TEX. CODE CRIM. PROC. art. 42.18 §7 (Vernon 1994) (currently codified at TEX. GOV'T CODE §508.001 (Vernon 2002)). Thus, Moussazadeh possesses not a constitutional right but a mere expectancy of parole under Texas law. Moussazadeh cannot set aside his guilty plea merely because this expectancy may not happen as soon as he would like. There is no guarantee that Moussazadeh would be granted parole regardless of the sentence imposed.

Moussazadeh's mere expectation that he would be eligible for parole after serving one-fourth of his sentence when, under the applicable statute, he is not eligible for parole until he serves one-half, did not lengthen the duration of his sentence. That dashed expectation amounts to nothing more than the denial of parole—and a denial of parole is not an increased sentence. *Page v. U. S. Parole Comm'n*, 651 F.2d 1083, 1085 (CA5 1981). Moussazadeh bargained for a reduction in the offense charged from capital murder to murder and took the risk that, because there was no agreed recommendation in sentence, the trial court could impose the maximum punishment. *Ex parte Moussazadeh*, No. 29,652-02, at 33, 45. Moussazadeh escaped that fate because the court imposed a seventy-five year sentence as opposed to the maximum sentence of life. *Id.*, at 135. Whether Moussazadeh is eligible for parole after serving one-fourth or one-half of that term, his sentence remains seventy-five years.

Because Moussazadeh did not know if the trial court would impose a sentence of 5, 20, 30 years—or life—he could not predicate his decision to plead guilty on a promise that he would be eligible for parole after one-fourth of that term, as opposed to one-half of that term. Until Moussazadeh was sentenced, a prospective date for parole eligibility did not even come into play. Thus,

Moussazadeh's parole expectation amounted to no more than a subjective belief of what his sentence might be and how much of it he might actually serve if he qualified for parole.

This case does not involve whether the defendant was accurately advised regarding the minimum and maximum range of punishment that could be imposed. *See Spinelli v. Collins*, 992 F.2d 559, 561 (CA5 1993) (holding that "as long as the defendant understands the length of time he might possibly receive, he is fully aware of his plea's consequences") (citations omitted). This case does not involve whether counsel erred in advising his client on an issue of law, creating in Moussazadeh a mistaken belief regarding a harsher sentence if tried, thereby causing him to forego his right to a jury trial. *See Cooks v. U.S.*, 461 F.2d 530, 532 (CA5 1972) (stating "[w]here counsel has induced defendant to plead guilty on the *patently erroneous* advice that if he does not do so he may be subject to a sentence six times more severe than that which the law would really allow, the proceeding surely fits the mold we describe as a 'farce and a mockery of justice'").

Instead, the issue presented concerns Moussazadeh's eligibility for parole—something that was not part of the plea bargain and had no effect on Moussazadeh's sentence. The State is aware of no precedent that holds all terms and conditions *discussed*—as opposed to agreed to—in the plea bargaining process, whether between defense counsel and his or her client or even with the prosecutor, can later be alleged as having induced the guilty plea. The door would swing wide open to allow such claims if the Court grants the petition for writ of certiorari, reviews the judgment of the Texas Court of Criminal Appeals, and holds that habeas relief is warranted in this case.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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